United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

17

372

IN THE

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 24,166

United States of America, Appellee

v.

Timothy R. Thomas, Appellant

Appeal from the United States District Court for the District of Columbia

---

Brief for Appellant

As requested, please read the following transcript pages: pp. 5-8.

IN THE

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 24,166

United States of America, Appellee

v.

Timothy R. Thomas, Appellant

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

QUESTIONS PRESENTED

1. Whether the Trial Court erred in not granting a continuance so that appellant could obtain other counsel.

2. Whether the denial of a continuance in order to obtain new counsel constituted a violation of due process.

3. Whether appellant was denied his right to the effective assistance of counsel, under the Sixth Amendment of the Constitution of the United States, by the Trial Court's decision not to grant a continuance, in light of all the facts and circumstances which the Court had before it or could have learned through inquiry after having had notice of possible difficulties, thereby forcing him to trial without allowing him sufficient time to obtain other counsel.

THIS CASE HAS NOT PREVIOUSLY BEEN BEFORE THIS COURT.

JURISDICTIONAL STATEMENT

A judgment of conviction was entered against the Appellant on March 10, 1970 in the United States District Court for the District of Columbia under D. C. Code §§22-3202, 22-502 and 22-3204, and thereafter an appeal was timely noted. On March 20, 1970 an Order was entered authorizing the Appellant to proceed

on appeal without prepayment of costs. Jurisdiction of this Court is invoked under 28 U.S.C.. §1291.

REFERENCES TO RULINGS

None

STATEMENT OF THE CASE

In an indictment filed April 3, 1969, returned by a grand jury sworn in on February 3, 1969, the appellant, Timothy R. Thomas, was charged with crimes in twenty-eight counts; namely, nine (9) counts of armed robbery, nine (9) counts of robbery, nine (9) counts of assault with a dangerous weapon, and one (1) count of carrying a dangerous weapon. On October 3, 1969, the case was called and both sides announced ready for trial. The trial was set for December 22, 1969.

At the commencement of trial on December 22, 1969, before the Honorable June L. Green, the Government dismissed six (6) counts of armed robbery, six (6) counts of robbery, and five (5) counts of assault with a dangerous weapon, because they were unable to locate certain persons listed as complainants (Tr. 3) Of the remaining three (3) counts of armed robbery, three (3) counts of robbery, four (4) counts of assault with a dangerous weapon, and one (1) count of carrying a dangerous weapon, the

petit jury, on March 10, 1970, found the appellant guilty on three (3) counts of armed robbery, four (4) counts of assault with a dangerous weapon, and one (1) count of carrying a dangerous weapon. Judgment of conviction was entered and this appeal was thereafter taken. The "Notice of Appeal" was prepared and filed by Timothy R. Thomas himself.

Thomas, at the outset of trial, moved for a continuance "due to the fact that [he] had ineffective representation over the past months of [his] incarceration pending trial" (Tr. 5) The following quote is taken from the Transcript of Proceedings (Tr.5,6, 7, 8) pertaining to Thomas' motion and its subsequent denial:

> "MR. THOMAS: Your Honor, I move for a continuance due to the fact that I have had ineffective representation over the past months of my incarceration pending trial.
>
> "I have filed a pretrial motion regarding a setting of bond which seemingly has been circumvented through my lawyer who has not represented it in court.
>
> "Also I filed a motion for termination of counsel and under Rule 44 to appoint me counsel to assist in my defense.
>
> "And also my last resort which the Court should have received is writ of habeas corpus which is in violation of certain rules and amendments.
>
> "I would just like to ask the Court would they take this into consideration at this time.
>
> "THE COURT: First of all, your attorney was retained.
>
> "MR. THOMAS: Right, Your Honor.

"THE COURT: "Well, why didn't you get other counsel if you wanted other counsel?

"MR. THOMAS: Well, in my letter before -- I understand my case was heard on October 3 and the United States Attorney and my attorney announced ready for trial.

"But in September of this year before my case was on the ready calendar I moved to dismiss Attorney Brown from my case. Yet he still announced ready for trial.

"I also wrote a letter, that wasn't exactly an affidavit but I was hoping it would act as such, to tell the Court about my conditions while I was on bond and since I have been incarcerated pertaining to my legal representation.

"I asked the Court would they please appoint me a Legal Aid Attorney.

"I received a letter from your Clerk or Mr. John H. Midlen, Jr., stating that he had referred my motion and letter to Mr. Brown for any disposition he wishes to make.

"I received no word whatsoever, Your Honor.

"THE COURT: All of your motions have been considered. I know that one letter was written to me under date of May 7 from Judge Curran -- considered and denied it. Your letter was directed to Judge Curran.

"These charges, as you know, are all serious cases.

"MR. THOMAS: I understand that, Your Honor.

"THE COURT: That is reason enough for you to be incarcerated, twenty-eight counts of armed robbery, assault with a dangerous weapon, carrying a dangerous weapon.

"MR. THOMAS: I understand that, Your Honor.

"THE COURT: This is reason enough.

"Now we are ready to proceed. For what reason do you want to continue this case with these witnesses all present and ready to go?

"MR. THOMAS: Because it is inadequately prepared. I haven't seen Attorney Brown since June.

"MR. TREANOR: Your Honor, may I be heard on this? I don't want to put Mr. Brown in an awkward position. We all know how experienced Mr. Brown is. Among other things he is a former Assistant U. S. Attorney.

"Be that as it may, Mr. Brown has filed motions in this case for mental observation and caused this man to be examined.

"He has filed motions in the case for production of Grand Jury minutes and they have been produced.

"Mr. Brown and I have discussed this matter on several occasions. He is in possession of all the material in this case to which he would be entitled under the most generous interpretation of any discovery rules.

"I am sure if he were to speak for himself he would tell you that he is as ready for trial as he could be considering the fact that the evidence in this case is rather overwhelming.

"THE COURT: Well, the Court has every confidence in Mr. Brown's ability, whether retained or appointed, and your motion for a continuance is certainly denied."

The facts leading up to Thomas' motion for continuance as shown in the attached affidavits are as follows:

In a letter to his attorney dated September 10, 1969, Thomas stated, inter alia, "even though I am merely a layman at law, I still know that I have been 'short-changed' by your negligence in my case . . . I consider it would be safer and more beneficial for me to move towards retaining a new attorney for my

defense". In response, Thomas' attorney, on September 16, 1969, wrote: "If you feel that you did not receive the effective assistance of counsel, or that you are being 'short-changed' by what you conclude to be my negligence, then I heartily suggest that you make efforts to obtain other counsel to represent you . . . if you are so good at analyzing what ought to be done to get you out of this mess, how in the world did you ever get in it?" Thomas, thereafter on September 28, 1969, responded: " . . . at this time I merely wish to say, that I hardly want you to represent me in any further court action pertinent to my case, I don't want to see you, and I would never go in the courtroom with you as my lawyer." (See Affidavit of Timothy R. Thomas and copies of above three letters attached thereto.)

In another letter, found in Judge Green's file, from Thomas to "The Hon. John J. Sirica" dated September 28, 1969, Thomas indicated that he had dismissed his attorney, and was not represented by any lawyer and respectfully requested an appointment of a legal aid attorney. (See Affidavit Verifying Delivery of Certain Documents and Affidavit of Timothy R. Thomas with copy of said letter attached thereto.)

In a notarized "Motion To Set Bond pursuant to the VIIIth Amendment Under United States Constitution or Release On Personal

Recognizance Under Title 18 U.S. Code Section 3146 (A-e)" sent by Timothy R. Thomas to the United States District Court for the District of Columbia dated September 30, 1969, Thomas stated that he was "without counsel to represent him in this matter." (See Affidavit Verifying Delivery of Certain Documents and Affidavit of Timothy R. Thomas with copy of said motion attached thereto.)

Copies of the letter of September 28, 1969, and the motion of September 30, 1969 were apparently forwarded, by John H. Midlen, Jr., Law Clerk to Judge Green, to Timothy Thomas' attorney of record who apparently did nothing with regard to them (Tr. 6) A review of the docket entries indicates that neither the above letter (which it is believed should be regarded as a pro se motion) nor the above motion was ever recorded, or a determination made thereon.

On October 14, 1969, Thomas' attorney in a letter to Thomas wrote: "I advised Judge Green of the content of your letters to the effect that you no longer desired to retain my services. The Court instructed me to advise you that if you wish to change lawyers it will be necessary for you to have your new attorney enter his appearance no less than ten days before trial, at the very latest." Thomas thereafter sought the aid of the Legal Aid Agency and by letter dated November 26, 1969 requested a legal

aid attorney. Shortly thereafter Thomas determined that it would be necessary to file a "Motion For Termination of Counsel", in order to discharge his attorney and before another attorney could represent him. (See Affidavit of Timothy R. Thomas and copies of above two letters attached thereto.)

Thomas then prepared and sent a notarized "Motion For Termination of Counsel" dated Dec. 1, 1969 to Judge Green wherein he presented his reasons for such request and mentioned the forwarding to "counsel" of his letter to "The Hon. John J. Sirica" and "Motion To Set Bond . . .". Both this letter and motion, as well as the "Motion For Termination of Counsel", were in the files of Judge Green. (See Affidavit Verifying Delivery of Certain Documents.) Thomas also indicated that his attorney was amenable to discharge and that "counsel had shown little or no interest in representing petitioner effectively." (See Affidavit of Timothy R. Thomas and copy of above motion attached thereto.) By "Writ of Habeas Corpus", dated Dec. 5, 1969, Thomas again informed the court that he "has been desperately, wanting and trying to dismiss [his attorney] from this case since September of 1969, [and that his attorney] is quite amenable to discharge and is presently under motion for termination." (See Affidavit Verifying Delivery of Certain Documents

and Affidavit of Timothy R. Thomas and copy of above Writ attached thereto.) A review of the docket entries similarly indicates that this motion and the "Writ of Habeas Corpus" were not recorded nor were any determinations made thereon.

ARGUMENT I

THE TRIAL COURT ERRED IN NOT GRANTING A CONTINUANCE SO THAT APPELLANT COULD OBTAIN OTHER COUNSEL.

The law is clear on the point that a client has the absolute right to discharge his attorney and terminate the relation at any time, and therefore no reference to cases belaboring the point will be made. (See 7 C.J.S. Sec. 109, p. 941 and Sec. 121, p. 951). However, when a trial is pending, an order of the court is required in order to discharge an attorney of record. As stated in Evans v. Ockershausen, 69 App. D.C. 285, 100 F. 2d 695, "It is settled law that a client, with an order of Court, has the right to discharge an attorney, with or without cause."

In the case at hand, it is appellant's contention that the trial court acted arbitrarily and abused its discretion, constituting error, in denying his request for a continuance. A simple review, by the court, of letters and motions prepared and sent by Thomas to the court, and an inquiry into the reasons for such letters and motions would have revealed the clear lack of harmony, if not animosity, between Thomas and his attorney of record, Mr. Brown, and the lack of confidence which Thomas had in said attorney. (Affidavit of Timothy R. Thomas and attachments thereto.)

Thomas in his letter of September 28, 1969, to the Honorable John J. Sirica (Annex 4, Affidavit of Timothy R. Thomas), notified

the court of his attempt to discharge his attorney, which, in effect, should have been construed by the court as a request for an order to discharge his attorney, or if not, it should have at least put the court on notice of possible difficulties between client and attorney.

Two days later, on September 30, 1969, in a pro se "Motion to Set Bond ..." (Annex 5, Affidavit of Timothy R. Thomas), Thomas notified the court that he was without counsel. Judge Green was thereafter personally informed by Mr. Brown of Thomas' attempt and desire to discharge him. (Annex 6, Affidavit of Timothy R. Thomas). About the same time as the personal notification, or shortly thereafter, Judge Green's law clerk forwarded the said letter and motion to Mr. Brown, (Annex 7, Affidavit of Timothy R. Thomas), and apparently received no reply.

Thomas, again on December 1, 1969, prepared and sent to Judge Green a "Motion for Termination of Counsel" (see Affidavit Verifying Delivery of Certain Documents). This motion was not recorded in the Criminal Docket, or in the Court Clerk's Memorandum and there is no indication that any determination was made with regard to said motion, or that there was any inquiry or hearing pertaining to this motion (see Docket Entries and Court Clerk's Memorandum).

The appellant asserts that in view of the prior evidence of dissatisfaction with counsel the court erred in not considering Thomas' Motion for Termination of Counsel. Had the court heard such motion, it would have learned before trial of the complete lack of harmony between Thomas and Mr. Brown, and of Thomas' lack of confidence and dissatisfaction with Mr. Brown. More importantly, the court would have been made aware of the correspondence between Thomas and Mr. Brown, of September 10, 1969 (Annex 1, Affidavit of Timothy R. Thomas), September 16, 1969 (Annex 2, Affidavit of Timothy R. Thomas, and September 23, 1969 (Annex 3, Affidavit of Timothy R. Thomas), resulting in the discharge of Mr. Brown, and would have known that Thomas' attempt to discharge Mr. Brown was not done to delay or disrupt his trial, but rather was an attempt by Thomas, which started almost three months earlier, even before the trial date was set (which occurred on October 3, 1969), to exercise his right to discharge his attorney with whom he was dissatisfied.

Then, again, on December 5, 1969, Thomas prepared and sent a further plea to the court by "Writ of Habeas Corpus" (Annex 10, Affidavit of Timothy R. Thomas) wherein he stated that he "has been desperately wanting and trying to dismiss Brown from this case since September of 1969." Thomas even stated that Mr. Brown was "quite amenable to discharge and is presently under motion

for termination." Yet, again, the court declined to inquire into the matter and the Writ was not recorded nor was any determination made thereon (see Docket Entries and Court Clerk's Memorandum).

Finally, at trial, in a desperate attempt to again draw the court's attention to the difficulties between Mr. Brown and himself, Thomas requested a continuance of trial. He informed the court that his case was inadequately prepared (Tr. 5, 7) and in fact that he had not seen Mr. Brown since June (Tr. 7), six months prior to trial!

With all of the above facts which were available to the court even before trial commenced, appellant maintains that it was error and an arbitrary and clear abuse of its discretion to deny Thomas' request for a continuance, and such denial was prejudicial to appellant.

Appellant further maintains that his request was not an attempt to delay or disrupt his trial, but rather that it was a good faith attempt to again inform the court of his dissatisfaction with his attorney and his belief that his case was inadequately prepared, and therefore sought a continuance in order to have his attorney replaced.

The importance of having an attorney with whom one has confidence and faith should not be taken lightly. This court, in Lee v. U. S., 235 F2d 219 (1956) cited In re Mandell, 69 F. 2d

830, 813 (2nd Cir., 1934) for the proposition that: "The relationship between attorney and client is highly confidential, demanding personal faith and confidence in order that they may work together harmoniously."

In the case at hand a review of the correspondence between Mr. Brown and Thomas demonstates quite clearly and quite emphatically the lack of confidence and personal faith and also states quite clearly that Thomas "would never go in the courtroom with" Mr. Brown as his lawyer. (Annex 3, Affidavit of Timothy R. Thomas). The fact that Thomas had apparently not seen Mr. Brown since June of 1969 indicates that they not only did not work together "harmoniously", but probably that they did not even work together.

In a recent case, McKoy v. United States, D. C. App. Nos. 4922, 4923, March 24, 1970, 98 Wash. L. Reporter No. 67, p. 585, this court stated: "When faced with a request for a change of counsel, either retained or appointed, the court must consider the merits of the defendant's complaints, the delay between the cause of the dissatisfaction and the request, the nearness to trial or completion thereof, and the general dictates of fairness and justice both for the defendant and the government." The appellant herein maintains that the trial court neven even considered these factors because it did not rule on Thomas' timely

requests, including Motion for Termination of Counsel.

Appellant therefore respectfully requests a reversal of the judgment of conviction on grounds that the denial of a continuance by the trial court was erroneous and prejudicial to appellant, thereby requiring a reversal of the judgment of conviction.

In the alternative, appellant respectfully requests that the judgment of conviction be reversed and remanded for a new trial.

ARGUMENT II

THE DENIAL OF A CONTINUANCE IN ORDER TO OBTAIN NEW COUNSEL CONSTITUTES A VIOLATION OF DUE PROCESS.

Since the facts in the case at hand clearly demonstrate that Thomas' attempt to discharge his attorney and his request for a continuance were not done to merely delay or disrupt his trial, as evidenced by his attempts to discharge Mr. Brown since September, 1969, the denial of his request for a continuance constituted a violation and a clear denial of due process. With all the motions before the court, namely, the letter to the Honorable John J. Sirica, the "Motion to Set Bond ...", the "Motion for Termination of Counsel" and the "Writ of Habeas Corpus", all received by the court well in advance of trial, and the court's inaction thereon, culminated by the denial of Thomas' motion, at trial, for a continuance was,in effect, a denial by the court to provide reasonable time and opportunity for Thomas to secure an attorney. Thomas stated that he had not seen Mr. Brown since at least June, 1969 (Tr. 7) (six months prior to trial). By filing numerous pro se motions, he did not treat him as his attorney, and, in fact, apparently thought he had discharged him back in September, 1969. Therefore, it may be presumed that Thomas actually believed himself to be "without counsel". In view of the court's inaction on Thomas' requests, he was not afforded a reasonable opportunity to obtain

other counsel. In Lee v. U. S., supra, this court stated: "The Supreme Court has held that a trial court's failure to provide 'reasonable time and opportunity to secure counsel was a clear denial of due process'."

Appellant herein maintains that the trial court by denying his request for a continuance not only did not provide reasonable time and opportunity for him to obtain counsel but, in fact, by not considering his motions, thereby preventing him from discharging his attorney, also frustrated his attempts to seek appointed counsel.

Appellant respectfully requests therefore, that because of his denial of due process of law, his judgment of conviction be reversed; or, in the alternative, that his judgment of conviction be reversed and remanded for a new trial.

ARGUMENT III

APPELLANT WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, UNDER THE SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, BY THE TRIAL COURT'S DECISION NOT TO GRANT A CONTINUANCE, THEREBY FORCING HIM TO TRIAL WITHOUT ALLOWING HIM SUFFICIENT TIME TO OBTAIN OTHER COUNSEL.

(1) When Thomas wrote the court on September 28, 1969 (Annex 4, Affidavit of Timothy R. Thomas), pertaining to his attorney, he had on the same date, in a letter to Mr. Brown (Annex 3, Affidavit of Timothy R. Thomas), dismissed him as his attorney. The subsequent efforts by Thomas well in advance of trial to notify the court of such dismissal and to have it recognized by an appropriate court order are set forth in Argument I, supra. Despite such notification, no action was taken by the court in advance of trial and appellant was therefore forced to continue with an attorney not of his choice and in whom he apparently lacked confidence.

In United States v. Mitchell, 354 F. 2d 767, (2nd Cir., 1966) the court stated that a defendant has a right under the Sixth Amendment to the effective assistance of counsel, and by forcing a defendant to trial without allowing him sufficient time to obtain defense counsel of his own choice was a denial of such right. In that case, the court held that the trial judge abused his discretion by granting appellant only the period between

Wednesday, September 8, and Monday, September 13, to obtain the effective assistance of counsel and thus, in effect, deprived him of such assistance. In the case at hand the court,by its inaction on appellant's requests, did not grant any time whatever to obtain another attorney and appellant was thereby deprived of the effective assistance of counsel.

(2) A review of the trial transcript, however, does not itself reveal any obvious prejudice or inadequacy of counsel. The rights of appellant appear to have been adequately defended, and appellant cannot point to any other appealable errors in the record.

(3) This Court, however, should not have to speculate as to whether or not appellant might have been prejudiced by being forced to accept counsel not of his own choosing. There was more than ample opportunity by the Trial Court to inquire into the appellant's dissatisfaction with counsel in advance of trial, and to make findings or otherwise ascertain that no prejudice could result to appellant. It failed to do so, and as a result, under the facts in this case, there is an inadequate record with respect to the issue of effective representation of counsel in this appeal.

Further, the length of time which elapsed between the first communication with the court until the start of trial, and the

repeated efforts of the appellant in the interim to have the dismissal of his attorney of record recognized by the court, imposed an affirmative duty on the court to inquire into the nature of the disagreement, prior to continuing the trial.

Appellant therefore respectfully requests a reversal of the judgment of conviction on the grounds that the trial court denied him the effective assistance of counsel, or, in the alternative that the judgment of conviction be reversed and remanded for a new trial.

Conclusion

For the foregoing reasons, the appellant respectfully requests:

1. That the judgment of conviction be reversed or, in the alternative,

2. That the judgment of conviction be reversed and remanded for a new trial.

Respectfully submitted,

Glenn L. Archer, Jr.
Appointed by This Court
888 Seventeenth Street, N. W.
Washington, D. C. 20006

AFFIDAVIT VERIFYING DELIVERY OF CERTAIN DOCUMENTS

Edward Ross, being duly sworn, deposes and says:

1. That he is a law clerk to the Honorable June L. Green, United States District Judge for the District of Columbia.

2. That he did deliver on Nov. 10, 1970, to one Andrew J. Serafin, Esquire, certain documents from the Judge's file of Timothy R. Thomas, Criminal No. 501-69, and that

3. These documents were as follows:

A. A signed letter from "Timothy Thomas 162336" to "The Hon. John J. Sirica" dated September 28, 1969.

B. A notarized "Motion To Set Bond pursuant to the VIIIth Amendment Under United States Constitution Or Release On Personal Recognizance Under Title 18 U. S. Code Section 3146 (A - e)" signed by Timothy R. Thomas as "Defendant Pro Se", and dated September 30, 1969.

C. A notarized "Motion For Termination of Counsel" signed by Timothy R. Thomas as "Petitioner Pro Se", and dated Dec. 1, 1969.

D. A notarized "Writ of Habeas Corpus" signed by Timothy R. Thomas as "Petitioner Pro Se", and dated Dec. 5, 1969.

4. That the above listed documents are exact copies of documents remaining in Judge Green's file.

Edward D. Ross Jr.
Edward Ross

Subscribed and sworn to before me this 12th day of December, 1970.

Eleanore Soltanoff

ELEANORE SOLTANOFF
My Comm. Expires June 14, 1972

Notary Public, D.C.

AFFIDAVIT OF TIMOTHY R. THOMAS

Timothy R. Thomas, being duly sworn, deposes and says:

1. That he is the appellant in the case, United States of America v. Timothy R. Thomas, Criminal No. 501-69, U.S.C.A. No. 24,166.

2. That he prepared and sent a letter, a copy of which is attached as Annex 1, dated September 10, 1969, to Mr. Edwin C. Brown, Jr. his attorney, wherein he stated that it would be more beneficial for him to retain a new attorney.

3. That he received a letter, a copy of which is attached as Annex 2, from Edwin C. Brown, Jr. dated September 16, 1969, stating in part: "If you feel that you did not receive the effective assistance of counsel, or that you are being 'short-changed' by what you conclude to be my negligence, then I heartily suggest that you make efforts to obtain other counsel to represent you."

4. That he prepared and sent a letter, a copy of which is attached as Annex 3, dated September 28, 1969,to Mr. Edwin C. Brown dismissing Mr. Brown as his attorney.

5. That on the same date, September 28, 1969, he prepared and sent a letter, a copy of which is attached as Annex 4, to "The Hon. John J. Sirica" wherein he stated, among other things, "That since my formal dismissal of Attorney Brown, I am not represented by any lawyer and I respectfully request an appointment of a legal aid attorney."

6. That he prepared and sent a notarized "Motion To Set Bond pursuant to the VIIIth Amendment Under United States Constitution Or Release On Personal Recognizance Under Title 18 U.S. Code Section 3146 (A-e)",a copy of which is attached as Annex 5, dated September 30, 1969, to the United States District Court, wherein he stated that he was "without counsel to represent him".

7. That he received a letter, a copy of which is attached as Annex 6, dated October 14, 1969,from Edwin C. Brown, Jr. indicating that Mr. Brown informed Judge Green that "[Timothy R. Thomas] no longer desired to retain my services."

8. That he received a carbon copy of a letter, a copy of

which is attached as Annex 7, dated October 16, 1969, from John H. Midlen, Jr., Law Clerk to Judge Green , to Edwin C. Brown, Esquire stating: "Dear Mr. Brown: -- "Enclosed for any disposition you wish to make, are a letter and motion from your client in the above referenced case..."

9. That he prepared and sent a letter, a copy of which is attached as Annex 8, dated November 26, 1969, to Miss Barbara Bowman, Director Legal Aid Agency requesting the assistance of a Legal Aid Attorney.

10. That shortly after November 26, 1969, [redacted]

11. That he prepared and sent to Judge Green a notarized "Motion For Termination of Counsel" a copy of which is attached as Annex 9, dated December 1, 1969 and

12. That he prepared and sent to Judge Green a "Writ of Habeas Corpus", a copy of which is attached as Annex 10, dated December 5, 1969, wherein he stated that he "has been desperately, wanting and trying to dismiss Brown from this case since September of 1969 [and that his attorney] is quite amenable to discharge and is presently under Motion For Termination."

10. That shortly after Nov 26, 1969 he determined that it was necessary to file a ~~motion~~ "Motion For Termination of Counsel)" in order to discharge Mr. Brown and before another attorney could represent him.

Timothy R. Thomas

Timothy R. Thomas

Subscribed and sworn to before me this 13 day of March, 1970.

Wilma E. Hills
Notary Public

My Commission Expires Nov. 14, 1974

Box 25
Lorton, Va. 22079
MAX. Sec. Fac. - CB3
September 10, 1969

Mr. Edwin C. Brown, Jr.
Attorney-at-Law
1100 16th St. N.W.
Washington, D.C. 20001

Dear Sir:

Since I received a letter from you dated 7-15-69, I have written two very important letters to you. The one pertaining to the appeal concerning the denial of my conditional release and the other letter was for the purpose of our finding out all of the government witnesses names and if possible their addresses. I have no idea as to whether or not you received any or all of the letters, but in the event that you did not, then WHY haven't you responded? Mr. Brown, do you really expect me to stay in suspense until the weeks prior to my trial? If by any chance you did any more motions for me, then how could I possibly know? You haven't sent me a copy of anything that you've done and presently, you haven't informed me as to what you're doing in my case. By the WAY,

I have no doubt as to your qualifications as an Attorney, nevertheless, it is very evident, that you have failed to exert all of your efforts in my behalf.

Mr. Brown, I am fully aware that armed robbery is a very serious offense to be charged with, according to the laws of this society. I also realize that there are various methods used in the defense of each and every criminal case. So naturally, if every method of defense has not been exhausted, then the defendant has handle, but effective counsel in each legal proceeding of his case. Mr. Brown, even though I am merely a layman at law, I still know that I have been "short changed" by your negligence in my case. Any time, many future years of A mans life are at stake, it is not fair at all for him to realize what is for him and who is against him. Furthermore, it is a shame and a disgrace, that I would have to rely on a white Attorney for more effective results in my case, because since you are a Black Man such as me, you should feel some type of consciousness relating to the motion and outcome of my case. In any event, I wonder

it would be safer and more beneficial for me, to move towards retaining a new attorney for my defense. Although my sister has paid you $500.00 of the $100.00 for services that you have not yet rendered, we both feel as though you should just forget the money it took to file the two motions and also your two court appearances which total to $500.00. In view of the proceeding, I am sure that you know as well as I, a lesser sum of funds should be sufficient in the matter.

But if you are unwilling to do that, please let me know what you except of me.

Sincerely yours,

[illegible]

[illegible]

Law Offices of

BROWN AND BROWN

ATTORNEYS AT LAW

VIRGINIA OFFICE:
NORTH FAYETTE STREET
ALEXANDRIA, VIRGINIA
549-7070

WASHINGTON OFFICE:
1100 SIXTH STREET, N. W.
WASHINGTON 1, D. C.
549-7070
667-7188

September 16, 1969.

Mr. Timothy Thomas
Post Office Box 25
Lorton, Virginia 22079
MAX SEC FAC-CB3

Dear Sir:

Reference is made to your letter of September 10, 1969. Please be advised that I am very much aware that you have written two very important letters, among many, to me since your incarceration. With reference to your request for an appeal of your bond reinstatement: you were advised on July 15th that your request had been denied. You are further advised, that neither the Court House nor the judges are available for my continued repitition of the same type of request on your behalf. You were extremely fortunate that I was able to obtain a bond for you in the first instance. It is solely due to your gross negligence in this matter that you are now presently being confined. In answer to your question as to why I have not responded to your last two letters, among many: you were advised in my last letter of July 15th that there are many other cases that are being handled by me and time will not permit me to keep up a constant correspondence with you.

Please be further assured that I do not expect you to stay in suspense until two weeks prior to your trial, inasmuch as, to date, you have kept me in suspense as to what form of defense would be acceptable to you irrespective of my advice in that regard. Your mind has been changed no less than four times. It would be much simpler if you would let me handle your case instead of attempting to supervise it yourself.

Further, if any motions have been filed on your behalf, you may rest assured that you would have been notified. It is, therefore, more than reasonable to assume that, having received no such notification, no further motions have been filed. In addition thereto, I am not in the habit, nor is it my practice, nor shall it ever be my practice, to provide clients with copies of everything produced in my office that refers to their case.

I am pleased to note that you have no doubt as to my qualifications as an attorney; but, nevertheless, it is very evident that you have blocked, by the constant changing of your mind, the exertion of all efforts on your behalf, as against there being a failure to exert all such efforts.

If you feel that you did not receive the effective assistance of counsel, or that you are being "short-changed" by what you conclude to be my negligence, then I heartily suggest that you make efforts to obtain other counsel to represent you. Whether you are black or white is of no moment to me. I defend on the facts, not on the color. You are advised in this regard that I have made no less than four appearances in the District Court on your behalf; I have used such influence as is available to me to obtain for you a most generous bond release at absolutely no expense to you or to your mother , despite the fact that you are charged with an offense which, in this day and time, virtually demands a high risk bond; I have visited the scene of your crime; I have inspected the police files pertaining thereto; and I have interviewed the investigating officers. It is, therefore, my opinion that you are entitled to nothing in the way of a refund; in fact, it would probably cost an additional $75 to compensate me for what I have done thus far.

It is my sincere hope, however, that we will be able to proceed with your case in a much more amicable fashion than we have to date. I am indeed sorry if it grieves you that I can not communicate with you some two or three times a month. Nevertheless, should you feel that you no longer care to have my services, please be advised that I am quite amenable to your discharge.

To use a phrase of yours, "before I close this letter, please answer one question"; if you are so good at analyzing what ought to be done to get you out of this mess, how in the world did you ever get in it?

Sincerely yours,

Edwin C. Brown, Jr.

ECB:mht

(10)

Box 25
Lorton, VA. 22079
September 28, 1969

Mr. Edwin C. Brown
Attorney at law
1100 6th St. N.W.
Washington, D.C.

Dear Sir:

If I attempt to explain my personal feelings regarding you or your letter, I doubt very seriously that this letter would even reach you. So, at this time I merely wish to say, that I hardly want you to represent me in any further court action pertinent to my case, I don't want to see you, and I could never go in the courtroom with you as my lawyer.

Sincerely yours,
Timothy Thomas 167336
Max. Sec. Fac. CB3

ANNEX 4

[illegible]
[illegible]
[illegible]
[illegible]

OFFICE OF [illegible]

September 25, [illegible]

The Hon. John J. Sirica
U.S. District Court for the
District of Columbia crim. no. 501-69
Washington, D.C.

Your Honor:

Please excuse my procedure in confronting the most honorable court in an Attempt to obtain due process of law regarding my case, but, due to my experience as merely a layman at law this letter is the only means I know of being available to me.

On March 3rd, 1969; I was released on 10% of $2,000 bond which included conditions. The conditions which were stipulated are as follows:
(1) To reside at the same address with mother
(2) To be employed within 10 days of release
(3) To contact lawyer twice each week
(4) To keep active with the Dept. of Voc. Rehab. For the Disabled, located at 1331 H St. N.W.
Mr. Melvin K. Sutton acting as Rehabilitation Counselor.

Upon release on bond I obtained employment with Standard Electric Co., located at 4080 Benning Ave. Northeast, N.E. I would like to mention the fact that I have been employed with Standard prior to my arrest which I'm sure is to the satisfaction of the Dept. of Voc. Rehab. For the Disabled.

Because of my disability in the left [illegible]
and have also had [illegible]
[illegible]

the International Brotherhood Union of Electrical Workers, located on Wisconsin Ave. N.W.

While on bond I received an indictment and I was subject to appear in court. So, in compliance with all conditions stipulated in my release, I appeared in the U.S. District Court before the presiding Judge William B. Jones on April 15th, 1969, to answer the indictment. After pleading not guilty to armed robbery, I was asked by the Judge where was I working. I told the Judge that I had been working for Standard Electric Co. but due to my disability I had to leave the job. I also stated that I was being processed to enter the Inter. Bro. Union of Elec. Wkrs. but was presently unemployed. My bond was then revoked and I am now being held in lieu of $6 Bond.

With reference to the condition of my Arm. In June of 1968, I was shot in the left upper Arm. The metal bone was cut clean thru and surgery was imposed immediately at Gouverneur Hospital, on Staten Island. In August of 1968 I went to the Dept of Vocational Rehabilitation and was told that because I could not find employment in my trade and since I am a disabled veteran, I could possibly attempt at the time, to work at one of the colleges, which they

-4-

Your Honor, I will now mention the facts that pertain to my legal representation.

In February of 1991, my mother hired me to retain Attorney Edwin G. Burnside, to represent me in the criminal case which is still pending. Attorney Brown has recently been formally dismissed by me because, due to my incarceration I am unable to meet the balance of his required fee. Wherein if I had remained on bond, I would have received gainful employment to pay the Bonds required fee. This is the reason I am making application in my own behalf to the court for a review of my present bond status.

Your Honor, I still have sufficient family and community ties to be reinstated on bond, but if the court deems it necessary to retain the bond, then I hope the court will set a new and reasonable bond.

In my event, your Honor, please consider the fact that I have no prior history of felony arrest, I am not represented by any lawyer and it presently is beyond my capacity to [illegible]

Very

for the District of Columbia

United States of America
Plaintiff

V.

Timothy R. Thomas
Defendant

crim. no. 501-69

Motion To Set Bond pursuant to the VIII th Amendment Under United States Constitution Or Release On Personal Recognizance Under Title 18 U.S. Code Section 3146 (a-e).

Jurisdiction

This Honorable Court has Jurisdiction over this cause of action pursuant to U.S. Constitution and Title 18 U.S. Code Section 3146 (a-e).

Comes now the defendant, Timothy R. Thomas in the above stated action moves this Most Honorable Court for Personal Recognizance or to Set Bond in the above stated case, for the following reasons.

1) Defendant states he is confined here at Lorton penitentiary, where he has been since the revokation of his bond on April 18th, 1969.

2) Defendants bond was revoked because he was unemployed upon Court appearance.

3) Defendant was under medical care and was unable to continue his emploument as a

Construction Electrician with Standard Electric Co., 4080 Howard Ave. Kensington, Md. Defendant was to be reemployed with the International Union of Electrical Workers because the conditions would be better suited to his physical condition. During the period of changing jobs, the defendant had to make a Court appearance, at that time the conditions set forth by the Court was rendered.

4) Defendant furthers, this Most Honorable Court will consider the facts stated above and render unto defendant such relief as he seeks.

5) Defendant prays, this Most Honorable Court will renew his conditional release and grant him personal recognizance or 10% of a reasonable financial bond.

6) Defendant is not charged with a capital offense, yet he is held in confinement without Amount of no bond and for no reason.

7) Defendant is without counsel to represent him in this matter, therefore he comes before this Court as a layman with his own Knowledge and Ability to care for such matters.

In Conclusion

Defendant prays, this Honorable Court will accept and consider the facts stated herein and grant such relief as he now seeks.

Timothy R. Thomas

Timothy R. Thomas
Defendant Pro Se

I do hereby certify that I have forwarded (1) original and (2) copies of this action to the U.S. Clerks office U.S. District Court for the District of Columbia this 30 day of September 1969.

Subscribed and sworn to before me this 30 day of September 1969.

J.R. Curtis
Notary Public

Timothy R. Thomas
Defendant Pro Se

My Commission Exp. [illegible]

Affidavit of Poverty

I am of sound mind, I am over the age of 18 because of my poverty I am unable to pay the cost of this action or the relief I seek, I am unable to give security of same, I am a citizen of the U.S. and believe I am entitled to the relief I seek.

Subscribed and sworn to before me this 30 day of September 1969.

J.R. Curtis
Notary Public

Timothy R. Thomas
Defendant Pro Se

My Commission Exp. June 11, 1972

Law Offices of

BROWN AND BROWN

ATTORNEYS AT LAW

VIRGINIA OFFICE:
NORTH FAYETTE STREET
ALEXANDRIA, VIRGINIA
549-7070

WASHINGTON OFFICE:
1100 SIXTH STREET, N. W.
WASHINGTON 1, D. C.
549-7070
667-7188

October 14, 1969.

Mr. Timothy Thomas
162336
Max. Sec. Fac. CB 3
Post Office Box 25
Lorton, Virginia 22079

Dear Mr. Thomas:

Please be advised that a Calendar Call was held on your case last week. Your case has been assigned to be tried before Judge Green on December 22, 1969.

I advised Judge Green of the content of your letters to the effect that you no longer desired to retain my services. The Court instructed me to advise you that if you wish to change lawyers it will be necessary for you to have your new attorney enter his appearance no less than ten days before trial, at the very latest.

Very truly yours,

Edwin C. Brown, Jr.

ECB:mht

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA
WASHINGTON 20001

CHAMBERS OF
JUNE L. GREEN
JUDGE

October 15, 1969

Edwin C. Brown, Esquire
320 N. Fayette Street
Alexandria, Virginia

Re: United States vs. Timothy Thomas
Criminal No. 501-69

Dear Mr. Brown:

Enclosed for any disposition you wish to make, are a letter and motion from your client in the above referenced case.

Yours truly,

John H. Midlen, Jr.
Law Clerk to Judge Green

cc Mr. Timothy Thomas
Box 25
Lorton, Va. 22079

Washington, D.C. 20003
November 26, 1969

Miss Barbara Bowman, Director
Legal Aid Agency
310 Sixth St. N.W.
Washington, D.C. 20001

Dear Miss Bowman:

Please be advised that I am in immediated need of one of your Legal Aid attorneys. I am scheduled to start trial on December 22, 1969. At the present, I am not represented by counsel due to the fact that he has recently been dismissed.

I would deeply appreciate an interview by one of your staff at the earliest possible date.

Until I recieve your response, thank you for your time and patience.

Sincerely yours,
Timothy Thomas 162336
Dormitory, D.C. Jail.

the District of Columbia Circuit

United States Of America
Respondant

v. Criminal No. 501-69

Timothy R. Thomas
Petitioner

Motion For Termination Of Counsel

Jurisdiction

This Most Honorable Court has jurisdiction over this cause of action pursuant to Rule 44 of the Federal Rules of Criminal Procedures.

Comes now Timothy R. Thomas, the petitioner in the above stated action and respectfully moves this Court for termination of counsel for the following reasons:

I. Attorney Edwin C. Brown Jr. was "retained" by petitioner in February 1969 to represent petitioner in this criminal case.

II. Petitioner feels that attorney Brown is incompetant and inadequate to continue any further in this criminal case, because:

(A) Counsel has misled petitioner by stating he would file pre-trial motions pertaining to Grand Jury Minutes and Suppression of Evidence and has not done so.

(B) The Court informed counsel that — "Enclosed for any disposition you wish to make are a letter and motion from your client in the above referenced case." [Counsel made no (in-Court) disposition pertinent to the motion and letter, thereby depriving petitioner of the right to the effective assistance of counsel in all pre-trial proceedings.

III. Counsel and petitioner have not been able to reach a mutual understanding, to this day, as to what form of an adequately prepared defense should be applied at trial for an effective representation

IV. Petitioner received word in a letter from counsel stating: "should you feel that you no longer care to have my services, please be advised that I am quite amenable to your discharge."

V. Throughout the past months, to this day, counsel has shown little or no interest in representing petitioner effectively.

Conclusion

Petitioner prays, this Court will accept the facts stated herein and grant petitioners motion for termination of counsel.

Timothy K. Thomas
Petitioner Pro Se

Certification of Service

I do hereby certify that I have fowarded (1) original and (2) copies of this action to the U.S. Clerks office U.S. District Court for the District of Columbia this 1st day of Dec. 1969.

Subscribed and sworn to before me this 1st day of Dec. 1969.

Helma Pearce
Notary Public

Timothy K. Thomas
Petitioner Pro Se

My Comm. Exp. [illegible]

The District Of Columbia Circuit

United States Of America
Respondant

V. Criminal No. 501-69

Timothy R. Thomas
Petitioner

Affidavit Of Poverty

I am of sound mind, I am over the age of 18, because of my poverty I am unable to pay the cost of this action or the relief I seek, I am unable to give security of same I am a citizen of the U.S. and believe I am entitled to the relief I seek.

Subscribed and sworn to before me this 1st day of Dec. 1969.

Notary Public

Timothy R. Thomas
Petitioner Pro Se

My Commission Expires July 31, 1972

United States of America
Respondents

v. Criminal No. 501-69

Timothy R. Thomas
Petitioner

Writ of Habeas Corpus

Comes now the petitioner, Timothy R. Thomas pro se, respectfully moves this Honorable Court pursuant to the 8th, 13th and 14th Amendments to the U.S. Constitution and to grant pre-trial release pursuant to Title 28 U.S. Code Section 2241.
Petitioner represents as follows:

1) Petitioner Timothy R. Thomas and a co-defendant Marcellus P. Smith, were arrested on October 24th, 1968 and charged with robbery hold-up and carrying a dangerous weapon (gun) which occurred on or about Oct. 16th, 1968.

2) The charges against co-defendant Marcellus P. Smith were annihilated at his preliminary hearing which was held in November of 1968.

3) On February 4th, 1969, petitioners preliminary hearing was held before presiding Judge Charles Halleck and bound over to the Grand Jury.

4) In February of 1969, petitioner retained attorney Edwin C. Brown, Jr., for further legal representation.

5) On formal motion for bond filed by attorney Edwin Brown Jr. on behalf of petitioner, Chief Judge Edward M. Curran granted a ten per cent (10%) deposit on petitioners two-thousand ($2000) dollar bond and admonished petitioner with conditions. Petitioner was then freed on bond March 3rd, 1969.

6) While on bond, petitioner was indicted for armed robbery and scheduled to appear for arraignment on April 18th, 1969.

7) Petitioner appeared in Court on time as scheduled before presiding Judge William Jones and pleaded not-guilty to the indictment.

8) Petitioner complied with all conditions stipulated in bond-release, nevertheless, Judge Jones not only revoked petitioners ten per cent (10%) conditional release but, also revoked petitioners entire two thousand ($2000) dollar bond. Petitioner is to this day, being held in lieu of No Bond.

9) In May of 1969, petitioner filed an informal application (letter) for bond reinstatement to Chief Judge E.M. Curran. A post card was returned to petitioner in May stating: "Motion to reinstate personal bond denied." (Signed by Robert M. Stearns) Moreover, petitioner brings to the attention of the Court that he was never on "personal bond", but on a ten peceent (10%) cash deposit bond. Yet the Court denied petitioner something he neither had nor asked for.

10) Petitioner continued in his attempt for freedom on bond by filing an informal application to the U.S. Court of Appeals for the District of Columbia. Nathan Paulson (clerk to the Hon. David Bazelon) replied to petitioners letter stating in part: "I checked with the clerk of District Court and found that you are represented by retained counsel Edwin C. Brown, Esq. It is advised that you contact your attorney so that he may file properly for your appeal of District Courts denial for reinstatement of your bond."

11) Petitioner contacted Attorney Brown to the effect of appealing his bond reinstatement. Counsel did not file anything pertinent to the reinstatement of petitioners bond.

12) Petitioner sought redress by filing: "Motion to set bond under the 8th (eigth) Amendment to the U.S. Constitution or release on personal recognizance pursuant to Title 18 U.S. Code Section 3146 (a-e)." Petitioner fowarded a letter to the Court explaining every detail of petitioners disability while on bond and since incarceration.

13) Petitioners letter and motion were "referred to for any disposition", Attorney E.C. Brown, Jr. (Note: petitioner has been desparately wanting and trying to dismiss Brown from this case since September of 1967. Attorney Brown is quite amenable to discharge and is presently under motion for termination.

Respectfully Submitted

Timothy K. Thomas

Petitioner Pro se

For The District of Columbia

United States of America
Respondents

v. criminal NO. 501-69

Timothy R. Thomas
Petitioner

Points and Authorities In Support
of Writ Of Habeas Corpus

1) Petitioner is being illegally confined within violation of the 8th (eighth), 13th (thirteenth) and 14th (fourteenth) Amendments which are guaranteed to petitioner under the U.S. Constitution.

Recent cases see:
U.S. v. Leathers, U.S. App. D.C. ___ 97 Washington Law Reporter 821 decided May 14, 1969.
Woods v. U.S., U.S. App. D.C. NO. 21,496 decided January 19, 1969.
Alston v. U.S. U.S. App. D.C. decided Aug. 20, 1969.

Jurisdiction

This Honorable Court has Jurisdiction over the above entitled action pursuant to title 28 U.S. Code Section 2241.

Petitioner furthers, and moves this Honorable Court to Article (1), Section (9), Paragraph (2) of the U.S. Constitution which states in part:

"The privilage of the writ of habeas corpus shall not be suspended...."

IN CONCLUSION

Petitioner moves this Honorable Court to accept the facts stated in this habeas corpus along with points and authorities and grant petitioner the redress he seeks.

Respectfully submitted,

Timothy R. Thomas

Petitioner Pro se

Affidavit of Poverty In Support
of Habeas Corpus and Points and Authorities
28 U.S.C. 1915

I am a citizen of the United States because of my poverty I am unable to pay for the cost of this action or for the redress I seek.

Timothy R. Thomas

Petitioner Pro se

Certification of Service

I do hereby certify that I have fowarded (1) original and (2) copies of this action to the U.S. Clerks office U.S. District Court for the District of Columbia this 5th day of Dec. 1969.

Timothy R. Thomas

Petitioner Pro se

Subscribed and sworn to before me this 5 day of Dec. 1969.

Notary Public

My Commission Expires July 14, 1972

CERTIFICATE OF SERVICE

This will certify that I served two copies of the foregoing brief upon the United States of America this 16th day of November by placing a copy thereof in the United States mails postpaid addressed to the United States Attorney, United States Court House, Washington, D. C. 20001.

Glenn L. Archer, Jr.

Attorney for Appellant

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,166

UNITED STATES OF AMERICA, APPELLEE

v.

TIMOTHY R. THOMAS, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
C. MADISON BREWER,
Assistant United States Attorneys.

Cr. No. 501-69

INDEX

TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee the following issues are presented:

1. Whether the court's denial of appellant's *pro se* motion for a continuance, made on the day of trial after his retained counsel had announced ready for trial, constituted an abuse of discretion and a denial of due process of law?

2. Whether appellant was denied the effective assistance of counsel?

---

* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,166

UNITED STATES OF AMERICA, APPELLEE

v.

TIMOTHY R. THOMAS, APPELLANT

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By an indictment filed April 3, 1969, appellant was charged with nine counts of armed robbery,[1] nine counts of robbery[2] nine counts of assault with a dangerous weapon,[3] and one count of carrying a pistol without a license.[4] On December 22, 1969, appellant was tried by a jury before the Honorable June L. Green. Immediately

[1] 22 D.C. Code § 2901 and 3202.

[2] 22 D.C. Code § 2901.

[3] 22 D.C. Code § 502.

[4] 22 D.C. Code § 3204.

before trial the Government dismissed six counts of armed robbery, six counts of robbery and five counts of assault with a dangerous weapon. The jury found appellant guilty on all remaining counts of armed robbery, assault with a dangerous weapon and carrying a pistol without a license. On March 10, 1970, appellant was committed for evaluation and study pursuant to the provisions of the Federal Youth Corrections Act.[5] On August 26, he was sentenced to five to fifteen years on counts 1, 4, and 7 (armed robbery), three to ten years on counts 3, 6, 9, and 10 (assault with a dangerous weapon), and one year on count 11 (carrying a dangerous weapon), to run concurrently and to take effect at the expiration of any sentence then being served in this or any other jurisdiction. This appeal followed.

The Offense

On October 16, 1968, at about 6:50 p.m., the members of an evening adult education class at Roosevelt High School were sitting in their seats in room 205 when two young men who had been lurking outside entered the classroom. One came through the front door while the other entered from the rear. The one in front quickly brandished a gun and announced that this was a holdup. While he waved his gun, his partner went around the room collecting money and valuables (Tr. 9-13, 39-43). From Mrs. Mildred Cooper the robber took $130 and a wallet; from Rosetta Campbell he obtained $2; and from Miss Audrey Adams he took $15 to $20 in cash and $5 worth of bus tokens. From a man in the front of the classroom he took a ring. He collected something from everyone (Tr. 15-16, 41-42). The offense took between five and ten minutes to complete, and the robbers then departed into the night (Tr. 36, 43).

The Arrest and Identification

One week later, on October 23 at about 3:00 p.m., after alighting from a bus at a stop on Georgia Avenue, Mrs.

---

[5] 18 U.S.C. § 5010 (e).

Cooper was walking toward Allison Street when she saw appellant and a companion. She definitely recognized appellant as the man with the gun who had held up the English class a week earlier. Although not sure, she thought that appellant's companion was the second robber (Tr. 13-14, 28, 30, 35). Mrs. Cooper hailed a passing police scout car, identified herself and told the officers about seeing the robbers (Tr. 17, 28). After hearing her out, Officers Saunders and Woods put Mrs. Cooper into the back seat of the scout car and went looking for the men she had seen.

Appellant and his companion were soon spotted emerging from a cash register store on Georgia Avenue (Tr. 17-18, 55-56). Both men were placed under arrest for the robbery and were then searched. Officer Saunders found a .22 caliber automatic pistol secreted under appellant's jacket (Tr. 57-59, 94). A search of appellant's companion, Marcellus P. Smith,[6] yielded a loaded clip which fit the pistol recovered from appellant[7] (Tr. 59-60, 94). Appellant and Smith were then transported to the Tenth Precinct.

At a subsequent lineup, Mrs. Cooper immediately identified appellant from the nine or ten men shown to her, as did Miss Adams (Tr. 18, 33-34, 37, 46).

The Trial

Prior to trial, the Government moved to dismiss seventeen of the original twenty-eight counts of the indictment because the witnesses involved in those counts could not be located (Tr. 3-4). Appellant then moved *pro se* for a continuance, representing to the court that his retained

---

[6] Smith was not brought to trial, apparently because of the inability of the victims to identify him positively as the second robber.

[7] Testimony at trial reveals a minor inconsistency as to who actually searched Smith. Both Officer Saunders, who testified during the Government's case in chief, and Officer Woods, who was a rebuttal witness, took credit for finding the clip (Tr. 59, 94).

counsel could not effectively represent him because he had not seen counsel for some time, and that it therefore followed that his defense was inadequately prepared. Appellant's motion was denied (Tr. 5-8).

Mrs. Cooper testified that the gun recovered from appellant looked like the same gun used in the robbery (Tr. 11, 13). She stated that she had observed appellant from a distance of approximately thirty-two feet throughout the five to ten minutes that it took to perpetrate the robbery (Tr. 12-13, 34-35), and that when she saw him on the street she immediately recognized him as the man who had brandished the gun and stood at the head of the room (Tr. 13-15, 28). She also stated that she recognized appellant at the lineup because he was the man who had robbed the class (Tr. 37). Miss Adams, who remembered appellant as a fellow student at Roosevelt High School, testified that he had been the gunman in the robbery (Tr. 43).

Appellant denied being present at Roosevelt High School on October 16, 1968, and denied participating in the robbery (Tr. 73-74). His defense was mistaken identify. He claimed to have been at home all day, leaving the house at 9:00 p.m. that evening to visit his girl friend (Tr. 74). He explained that Officer Saunders' search of him yielded nothing, but that in fact the gun and loaded clip had been found on his friend Marcellus Smith. Appellant denied knowing that Smith had been carrying the weapon (Tr. 76, 78). He stated that he knew Miss Adams as an ex-schoolmate from Roosevelt High (Tr. 82).

Appellant's seventeen-year-old sister, Lydia Hope Reed, recalled that on October 16, 1968, she saw appellant in bed when she left home to go to school, and that he was still there when she returned in the early afternoon. She stated that appellant had remained at home until 9:00 p.m. (Tr. 85-87).

Officer Shaler L. Woods, called as a rebuttal witness, testified that he had assisted Offieer Saunders in the ar-

rest of appellant and Smith, and that the gun had in fact been recovered from appellant (Tr. 93-94).

The jury deliberated about one hour and twenty minutes before finding appellant guilty.

ARGUMENT

I. The denial of appellant's *pro se* motion for a continuance was a sound exercise of judicial discretion and did not constitute a violation of due process of law.

(Tr. 5-8)

Advancing a two-pronged argument, appellant now challenges his conviction on the grounds that the court denied his *pro se* motion for a continuance, which he first made on the day of trial. He asserts that such denial was an arbitrary abuse of judicial discretion, so erroneous and prejudicial as to require a reversal of his conviction; he also asserts that the denial was violative of due process of law. We think otherwise.

It is well settled that the grant or denial of a continuance is a discretionary power vested in the trial judge. *Mahoney* v. *United States*, 137 U.S. App. D.C. 3, 5, 420 F.2d 253, 255 (1969); *Neufield* v. *United States*, 73 App. D.C. 174, 118 F.2d 375 (1941). Absent clear abuse, exercises of that discretion will not be subject to appellate review. *Gilmore* v. *United States*, 106 U.S. App. D.C. 344, 273 F.2d 79 (1959); *Payton* v. *United States*, 96 U.S. App. D.C. 1, 222 F.2d 794 (1955). We submit that appellant has not shown abuse by the trial court.

The record discloses that the motion for continuance was made for the first time on the day of trial, a practice commonly employed by those who wish to delay the proceedings of justice. In neither the trial court nor this Court has appellant shown any necessity for his requested continuance. His request was based upon his feeling that his defense was inadequently prepared by his retained counsel (Tr. 7). Appellant's feeling, in turn, was apparently based on his dissatisfaction because he had not

seen his counsel for some time (Tr. 5, 7). No other explanation was given. When the court inquired into appellant's efforts to obtain new counsel, appellant's response indicated a less than diligent effort to help himself.

> THE COURT: First of all, your attorney was retained.
>
> MR. THOMAS: Right, Your Honor.
>
> THE COURT: Well, why didn't you get other counsel if you wanted other counsel?
>
> MR. THOMAS: Well, in my letter before—I understand my case was heard on October 3 and the United States Attorney and my attorney announced ready for trial.
>
> But in September of this year before my case was on the ready calendar I moved to dismiss Attorney Brown from my case. Yet he still announced ready for trial.
>
> I also wrote a letter that wasn't exactly an affidavit but I was hoping it would act as such, to tell the Court about my conditions while I was on bond and since I have been incarcerated pertaining to my legal representation.
>
> I asked the Court would they please appoint me a Legal Aid Attorney.
>
> I received a letter from your Clerk or Mr. John H. Midlen, Jr., stating that he had referred my motion and letter to Mr. Brown for any disposition he wishes to make.
>
> I received no word whatsoever, Your Honor.
>
> THE COURT: All of your motions have been considered. I know that one letter was written to me under date of May 7 from Judge Curran—considered and denied it. Your letter was directed to Judge Curran.
>
> These charges, as you know, are all serious cases.
>
> MR. THOMAS: I understand that, your Honor (Tr. 5-6).

The prosecutor summarized for the court some of the efforts undertaken by defense counsel on behalf of his

client (Tr. 7). The court, after expressing confidence in counsel's abilities, denied appellant's motion (Tr. 8).

We note that appellant's retained trial counsel had announced on October 3, 1969, more than two and a half months prior to trial, that he was prepared to proceed. Apparently at that time he also indicated that appellant desired other counsel.[8] Yet during the intervening period appellant did not see fit to obtain new counsel, nor did appellant see fit specifically to request new counsel on the day of trial. He stated only that he wanted a continuance because he had had what he termed "ineffective representation" during his incarceration (Tr. 5). It seems to us on this record that appellant was less concerned about replacement of counsel than he was about forestalling his day in court.

Appellant now seeks to elevate this denial of his request for a continuance into a violation of due process such as this Court found in *Lee* v. *United States*.[9] We submit that appellant's failure to articulate or allege anything more than a general apprehension about his counsel, who had already stated that he was ready to proceed, defeats this claim. This is not a case where a defendant prior to trial discharged his attorney. Nor does appellant even now allege, with specificity, any harm arising from the denial of his request.[10] We submit that the court's refusal to grant a continuance was neither an abuse of discretion nor a denial of due process of law.

---

[8] See the Calendar Call memorandum contained in the record. That memorandum notes that appellant wanted other counsel, and that a report of such counsel was to be made by to the court within five days. The record is unclear concerning the party who was supposed to make such a report.

[9] 98 U.S. App. D.C. 272, 235 F.2d 219 (1956).

[10] We note that appellant does not even suggest that his trial counsel was not prepared to proceed; in fact, he expressly disclaims any specific error of trial counsel (Briefs for appellant at 19).

II. Appellant was ably represented at trial by counsel who conducted a vigorous defense of his client.

(Tr. 7, 14-15, 19, 41, 43)

Appellant argues that his conviction should be overturned because he was denied the effective assistance of counsel. The thrust of appellant's complaint seems to turn on his unhappiness with his retained attorney. Such disaffection certainly does not alone establish appellant's entitlement to relief. As appellant himself notes, he cannot show any obvious prejudice or any inadequacies in his defense (Brief for appellant at 19). We submit that this admission, whether intended to be a recognition of the heavy burden he must bear or an attempted damnation by faint praise, is sufficient in and of itself to nullify appellant's argument.

The issue of ineffective assistance of counsel is to be decided by examining the total record and determining whether the representation afforded was so inadequate that appellant was denied a fair trial. *Harried* v. *United States*, 128 U.S. App. D.C. 330, 333-336, 389 F.2d 281, 284-287 (1967). Such an examination shows that appellant's trial counsel, an experienced member of the bar, conducted a vigorous defense of his client. On February 28, 1969, he successfully moved to have appellant's bond reduced from $2000 to 10% of that figure.[11] He filed a motion to dismiss the indictment and for production of grand jury minutes.[12] He also filed a motion requesting

---

[11] This motion was granted by the Honorable Edward M. Curran, who imposed several conditions upon appellant's release. One of those conditions was that appellant was to obtain employment within ten days after being released. Appellant's failure to abide by this particular condition led Judge Jones to revoke appellant's bond at arraignment on April 18, 1969. It was at this point that appellant began to be unhappy with his counsel, even though appellant had only himself to blame for the revocation.

[12] This motion was denied on April 29, 1969. Apparently, however, the grand jury minutes were produced for counsel (Tr. 7).

a mental examination of appellant.[13] Moreover, appellant's trial counsel conferred on several occasions with the prosecutor and was accorded wide latitude in informal discovery so that he might better represent his client and advance the client's interests (Tr. 7). The record reflects that during the course of trial counsel vigorously protected those interests.[14]

The evidence against appellant was overwhelming. Two of his victims identified him as the robber who stood, gun in hand, at the head of the classroom (Tr. 14-15, 19, 42, 43). Indeed, one of his victims knew appellant from high school (Tr. 41). A gun, which both victims stated looked like the one used in the robbery, was found on appellant's person when he was arrested (Tr. 11, 13, 43, 59).

Against this backdrop, appellant's vague dissatisfaction with his retained counsel seems frivolous indeed. Appellant's objection seems to turn less on what was done on his behalf than on the lack of counsel's success against insurmountable evidence. This Court has repeatedly pointed out that success of counsel is not the measure of his effectiveness. *Hammonds* v. *United States*, 38 U.S. App. D.C. 166, 425 F.2d 597 (1970); *Mitchell* v. *United States*, 104 U.S. App. D.C. 57, 259 F.2d 787, *cert. denied*, 358 U.S. 850 (1958). Nor does effectiveness necessarily turn on the number of pre-trial conferences between the accused and his counsel. *Gray* v. *United States*, 112 U.S. App. D.C. 86, 299 F.2d 467 (1962). This Court should not lend itself to appellant's unsupported attack upon the attorney whom he retained to represent him.

---

[13] This motion was filed on April 29, 1969. On May 26 Judge Pratt ordered the Legal Psychiatric Service to examine appellant. That order was vacated by Judge Pratt on June 11, 1969, for reasons undisclosed by the record.

[14] Since appellant was incarcerated, it can be assumed that counsel took the responsibility for his alibi-mistaken identity defense and for making certain that his witness was present on the day of trial. We do not here itemize counsel's efforts during the trial, since the record amply reveals that he conducted an able defense of appellant.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
C. MADISON BREWER,
Assistant United States Attorneys.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 416810 511